Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ROBERT B. McCLOY, JR.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a dissented opinion, the Tenth Circuit held that Dr. Robert B. McCloy, Jr. ("McCloy"), a horse owner-spectator, is strictly liable under the Horse Protection Act ("HPA") for the unauthorized improper actions taken by a horse trainer. This holding directly conflicts with every circuit court that has considered this issue, specifically, the Sixth, Eighth, Ninth, Eleventh, and the District of Columbia Circuits. The underlying issue considered by the Tenth Circuit was whether the United States Department of Agriculture ("USDA") erred in finding that McCloy violated 15 U.S.C. § 1824(2)(D) of the HPA when the horse trainer flatly disobeyed McCloy's instructions and used an unauthorized training method of "soring" before entering McCloy's horse in a show.

McCloy contends he did not violate the HPA because he: (1) took genuine meaningful steps to prevent his horse from being sore by making unannounced visits to the trainer's stables and specifically instructing the trainer not to sore his horse; (2) had no knowledge that the horse had been entered in the show by the trainer; (3) had no knowledge that his horse was sore or had ever been sored; and (4) did not participate or have any experience in training horses. The Tenth Circuit, however, held that if a horse is found to be sore, 15 U.S.C. § 1824(2)(D) imposes strict liability against horse owners, and horse owners are liable for violating the HPA merely by allowing horses to be entered in shows, regardless of whether the owners are implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring. The Tenth Circuit's decision conflicts not only with the other circuit courts that have considered this issue, but also with the USDA's own published Operating Plan.

Two questions are presented:

1) Does 15 U.S.C. § 1824(2)(D) of the HPA impose strict liability against a horse owner for the unauthorized acts of a trainer when the horse owner has taken genuine meaningful steps to prevent soring?

2) Did the Tenth Circuit unfairly violate individual rights by giving judicial deference to an unreasonable statutory interpretation of the HPA that contradicts the USDA's own published interpretation of the HPA and gives the USDA enforcement powers that were not intended by our legislature?

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *McCloy v. United States Department of Agriculture*, 351 F.3d 447 (10th Cir. 2003). *See* Appendix A. The Judicial Officer's Decision and Order was filed on March 22, 2002, and the Administrative Law Judge's Decision and Order was filed on August 10, 2001. *See* Appendices B and C.

STATEMENT OF JURISDICTION

The Tenth Circuit's opinion was issued on December 2, 2003. McCloy timely filed a Motion for Rehearing with Suggestion of Rehearing En Banc on January 12, 2004, which was denied on February 3, 2004. *See* Appendix D. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The HPA prohibits:

> [t]he (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore; (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore; (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore; and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

STATEMENT OF FACTS

1. McCloy is a full-time physician in Norman, Oklahoma. He is an upstanding professional who has served his community for many years. Decision and Order filed August 10, 2001, signed by Dorothea A. Baker, Administrative Law Judge (ALJ's Opinion), p. 3. He bought his first Tennessee Walking Horse (TWH) in 1964, and has been actively involved in owning TWHs and Quarter Horses since 1993. Transcript of Hearing Held before the Honorable Dorothea A. Baker, Administrative Law Judge, on August 22, 2000, in Oklahoma City, Oklahoma, filed September 11, 2001 (Transcript), p. 149.

Other than this case, McCloy has never been charged with violating the HPA, and he has always instructed trainers not to abuse or sore his horses. ALJ's Opinion, p. 5. In 1995, McCloy purchased a TWH named Ebony's Threat's Ms. Professor ("Missy"). Transcript, pp. 20-22. In 1997, McCloy placed Missy in training in Lewisburg, Tennessee at the stables of Ronal Young ("Young"), a professional horse trainer. Transcript, pp. 23-24. When Missy was moved to Young's stable, McCloy instructed Young to refrain from soring or otherwise abusing Missy, which Young agreed to and has acknowledged in the form of a sworn statement. Transcript, p. 158, RX B. Missy was shown by trainers a total of about 25 times and was always in compliance with the HPA. Transcript, pp. 151, 162.

During the time Missy was boarded at Young's stable, McCloy made unannounced visits to check on Missy and never saw any signs of abuse; she was always in good health and her gait was always free-flowing and natural. Transcript, pp. 152-53. McCloy always made it clear to trainers that they

were required to comply with the HPA. Transcript, p. 150. He took every precaution he believed was necessary to prevent abuse or violations of the HPA. Transcript, pp. 151-52.

The Celebration is the biggest show of the year for TWHs. In 1998, Missy was entered by Young in a class for trainers' wives in which Young's wife, Judy, planned to show. Transcript, pp. 152-53. McCloy did not know Missy was entered in the show; he was there to observe his other two horses. Transcript, p. 152. The first time he became aware that Missy was entered in the show was when Judy approached him in the horse show seating area and informed him that Missy had been disqualified. Transcript, p. 152. Upon receiving this information, McCloy immediately attempted to locate Young and Missy but discovered that they had already left the show grounds. Transcript, p. 153.

When McCloy confronted Young the next morning, Young assured him that what happened did not involve McCloy; Young explained that the "ticket" was issued only to Young. Transcript, pp. 153-54, 195. Young also informed McCloy that he was shutting down his business, which he ultimately accomplished within six months, and he asked McCloy to please bear with him until he was able to do so. Transcript, p. 154. McCloy began making plans to move Missy, and Young did not enter Missy in any more shows, except for two shows where McCloy was personally present to examine Missy before both shows. Transcript, pp. 174-75.

2. The USDA never charged Young with violating the HPA. Transcript, p. 147. McCloy first learned that he was being charged with a violation after he was interviewed by a

USDA investigator in Norman, Oklahoma in November, 1998. Transcript, p. 154. At the administrative hearing, the ALJ found "that [McCloy] was a truthful, credible witness. His demeanor displayed honesty and integrity. His testimony has been awarded full credence and credibility." ALJ's Opinion, p. 8. In this regard, McCloy was found to have taken genuine meaningful steps to prevent Missy from being sored. Nevertheless, the USDA imposed a strict liability standard on McCloy and ruled that he violated the HPA.[1]

3. McCloy filed his Petition for Review on July 19, 2002. The Tenth's Circuit's decision was entered on December 2, 2003. McCloy timely filed a Petition for Rehearing with Suggestion of Rehearing *En Banc* on January 12, 2004. On February 3, 2004, the Tenth Circuit denied the Petition for Rehearing with Suggestion of Rehearing *En Banc*. McCloy timely filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Whether the language of the HPA imposes strict liability on horse owners and whether Congress intended such an interpretation is an important question on which circuit courts are split. Because of the circuit split, this Court's guidance is essential. The Tenth Circuit's holding of strict liability against horse owners for the acts of horse trainers conflicts in various respects with the holdings of five other circuits and blatantly ignores the USDA's presentation of its case and its own Operating Plan.

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1. The ALJ and the JO found conflicting reasons why McCloy violated the HPA, and the JO added a period of suspension to McCloy's fine-only penalty.

All other circuits considering this issue have focused on the meaning of the word "allow" and analyzed whether the horse owner took sufficient steps to prevent soring. When the Tenth Circuit rendered its decision, it had the benefit of these prior opinions, but it disregarded them by imposing a strict liability standard that renders liability on a horse owner regardless of what actions an owner takes to prevent soring. Moreover, in 1999, shortly after the charges were brought against McCloy, the USDA implemented and adopted an Operating Plan, which specifically states that 15 U.S.C. § 1824(2)(D) provides an exemption from liability under the HPA for horse owners that meet certain requirements. Despite the inconsistency in how the USDA enforces the HPA, the Tenth Circuit gave judicial deference to a statutory interpretation not contemplated, argued or ever presented by the USDA in order to impose strict liability against McCloy. Review by this Court is warranted to determine whether judicial deference should be afforded to the USDA based upon a statutory interpretation that is contrary to the USDA's own published interpretation of the HPA.

Review of this case is further essential to prevent the Tenth Circuit from rewriting the HPA through a judicial interpretation that is beyond the intent of our legislature, presumably, in an effort to provide the USDA with enforcement powers at the expense of individual rights. Other circuit court opinions and the USDA's own Operating Plan recognize that the HPA gives a limited liability exemption to horse owners that take meaningful steps to prevent soring. The Tenth Circuit's opinion has left horse owners in an awkward and vulnerable position. Compliance with the HPA under the Tenth Circuit's interpretation has become virtually

impossible. A decision by this Court will bring the clarity and direction needed for USDA enforcement and horse owner compliance under the HPA.

A. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE LIABILITY STANDARD IMPOSED BY 15 U.S.C. § 1824(2)(D) OF THE HPA.

The Tenth Circuit affirmed the USDA's finding of liability by holding that 15 U.S.C. § 1824(2) can reasonably be interpreted to impose strict liability on horse owners if their horse is found to be sore. *See McCloy v. USDA*, 351 F.3d 447, 452-53 (10th Cir. 2003). According the Tenth Circuit, the word "allowing" in clause (D) of 15 U.S.C. § 1824(2) only requires the entry of a horse by an owner, and a horse's being sore is not a component of what the owner must "allow" to violate the HPA. *Id.* at 451-42.

The Sixth, Eighth, Ninth, Eleventh, and the District of Columbia Circuits have all addressed horse owner liability under 15 U.S.C. § 1824(2)(D). Contrary to the Tenth Circuit, however, none of these circuit courts has ever found that the HPA imposes strict liability on horse owners. Instead, these Circuits have all focused on the meaning of the word "allow" and what steps are required to be taken by an owner to avoid liability under the HPA.

In *Baird v. United States Department of Agriculture*, 39 F.3d 131 (6th Cir. 1994), the Sixth Circuit set out a test used in determining whether an owner "allowed" a sore horse to be entered in a horse show in violation of the HPA.

It determined that the USDA must make out a prima facie case as to a violation of the HPA, and the USDA establishes a prima facie case by proving: (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. *Id.* at 137. If the USDA establishes a prima facie case, the owner may then offer evidence that affirmative steps were taken to prevent soring. *Id.* If the owner is able to present such evidence and that evidence is "justifiably credited," the burden shifts back to the USDA so that it may prove that such admonitions were merely a pretext or self-serving ruse. *Id.* The *Baird* court noted that an owner could violate the HPA by explicitly condoning or authorizing the conduct or act in question, by "looking the other way," or by "burying one's head in the sand." *Id.* at 137.

Cases decided in the Eleventh and Eighth Circuits likewise do not support a strict liability analysis. In *Burton v. United States Department of Agriculture*, 683 F.2d 280, 283 (8th Cir. 1982), the Court held:

> [A]n owner cannot be held to have "allowed" a "sore" horse to be shown when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

In *Lewis v. Secretary of Agriculture*, 73 F.3d 312 (11th Cir. 1996), the Eleventh Circuit was persuaded, "with a

slight caveat," by the Eighth Circuit's opinion in *Burton*. The *Lewis* Court followed the *Burton* test because it "fits neatly into traditional judicial analysis. It carries out the purposes of the HPA while providing some protection for horse owners who are cooperating in seeking compliance." *Lewis*, 73 F.3d at 316. The caveat placed on the *Burton* test relates to the third element, which the *Lewis* Court found requires that compliance with that element be meaningful rather than ritualistic. *Id.*

Although *Burton* and *Lewis* refer to a Designated Qualified Person (DQP) examining and approving a horse before entering the ring as one of its elements, this is not an exclusive test and merely related to facts that were present in those cases. As is explained in *Baird*,

> [W]e do not read the three-pronged analysis set forth in *Burton* as constituting a hard-and-fast test to determine whether an owner has violated the [HPA]. Instead, *Burton*, in our view, provides guidance for courts reviewing cases like the one at bar, and it does so by enumerating a set of relevant factors to consider, a set that is not necessarily exhaustive.

Baird, supra, 39 F.3d at 136-37.

In *Stamper v. Secretary of Agriculture*, 722 F.2d 1483 (9th Cir. 1984), the Ninth Circuit did not pass on the issue of whether the owners "allowed" the entry of their horse because there was no evidence that the owners "instructed their trainers not to sore their horses." *Id.* at 1489. It found this to be a very important factor distinguishing the owner's case from *Burton*. *Id.* Because of the Ninth Circuit's recognition

that an owner's instruction to a trainer is of paramount importance, it clearly did not utilize a strict liability analysis. *See Id.* at 1488-89.

Finally, even in the opinion most relied upon by the USDA, *Crawford v. United States Department of Agriculture*, 50 F.3d 46, 51 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 824, 116 S. Ct. 88, 133 L. Ed. 2d 45 (1995), the D.C. Circuit held that it would be reasonable to conclude that an owner did not violate the HPA if the trainer flatly disobeyed the owner's instruction, and the trainer was terminated by the owner, or that someone else had sored the horse. Thus, although the USDA cites *Crawford* as support for its strict liability standard, the D.C. Circuit never adopted such a standard for horse owner liability under the HPA.

As pointed out in the dissent, the Tenth Circuit's majority opinion ignores the plain language of the HPA, does not consider the statutory language as a whole, and rejects an interpretation that would require the USDA to prove that the owner is somehow responsible for soring by authorizing, condoning, or remaining deliberately ignorant about it. *See McCloy*, *supra*, 351 F.3d at 453-54.

B. REVIEW IS NECESSARY TO RESOLVE WHETHER AN AGENCY IS ENTITLED TO JUDICIAL DEFERENCE FOR A STATUTORY INTERPRETATION THAT IS CONTRARY TO THAT AGENCY'S SUBSEQUENTLY ADOPTED AND PUBLISHED OPERATING PLAN.

The USDA's own published Operating Plan conflicts with the Tenth Circuit's opinion. More specifically, after McCloy was charged with violating the HPA, Section VII, Subsection D of the USDA's Horse Protection Program Operating Plan for the 1999 Horse Show Season ("Operating Plan") was adopted. In relevant part, it provides:

> D. *Limited Exemption from Liability.* ***Section 1824(2)(D) of the Act contains a limited exemption from liability for a horse owner who demonstrates that he or she did not "allow" the horse to be entered or exhibited in a show while sore.*** This exemption applies only to those owners who themselves did not participate in the entry, exhibition, sale, or auction of a sore horse. An owner, to avoid liability for "allowing" his or her horse to be shown or exhibited, entered, sold, auctioned, or offered for sale while sore, must first present credible evidence that he or she did not participate in the entry, transportation, preparation for showing, exhibiting, sale, or auction. Second, the owner must show that he or she took affirmative steps: (1) to select a trainer whom the owner would not reasonably expect would sore the horse; (2) to ensure that the trainer understands what soring is as defined in the HPA, understands that the owner does not want the trainer to sore the horse and understands the consequences of

> soring the horse; and (3) to periodically check the condition of the horse.

USDA's Horse Protection Program Operating Plan, pp. 20- 21 (emphasis added).

Thus, the Operating Plan specifically interprets Section 1824(2)(D) to provide an exemption under the HPA for horse owners that take affirmative steps to prevent soring, regardless of whether their efforts are successful. This is in stark contrast to the "strict liability" standard adopted by the Tenth Circuit. Under the USDA's Operating Plan, "allow" clearly does not encompass strict liability principles.

An agency's interpretation of a specific statutory provision is entitled to judicial deference and will be upheld only "***if it is reasonable and consistently applied***." *Universal Construction Company, Inc. v. Occupational Safety and Health Review Commission*, 182 F.3d 726, 728 (10th Cir. 1999). The Operating Plan in and of itself demonstrates that the USDA has not consistently applied "strict liability" to horse owners under the HPA. The USDA, therefore, should not be entitled to judicial deference. Review by this Court is necessary to determine whether judicial deference should be afforded to agency interpretations that conflict with their published enforcement guidelines.

Furthermore, the Tenth Circuit's rationale set forth in the majority opinion is unreasonable, confusing and difficult to follow. As noted in the dissenting opinion, the majority overanalyzes the HPA and ignores its plain language. *See McCloy*, 351 F.3d at 453-54. The majority focuses on the words "*respecting a horse which is sore*" in clause (D). It then opines that because clauses (A), (B) and (C) reference

a "horse which is sore," the "sore" language in clause (D) would become sloppy surplusage if it did not mean that what the owner must "allow" is merely the showing or exhibiting of a horse to violate the HPA if the horse turns out to be sore. *Id.* at 451.

Simply stated, it appears that the majority makes a distinction between "allowing an entry of a horse which is sore" and "allowing an entry respecting a horse which is sore." This, however, is a distinction without a difference. Both interpretations require that an owner "allow" the entry of a sore horse to violate the HPA.

Through an unreasonable and misconstrued interpretation, the majority holds that the latter phrase can reasonably be read to say "*that what the owner must 'allow' is merely the showing or exhibiting of the horse, but that there is no violation unless the showing or exhibiting was with respect to (i.e., involved) a sore horse.*" *Id.* at 451-52. By taking this position, the majority rewrites the statute and separates two very critical phrases in the above-quoted sentence. "*Respecting a horse which is sore*" is removed from the first half of the quoted sentence, and "*the owner allows*" is removed from the second half of the sentence. There is no justification for the majority to separate these phrases because both phrases are intertwined and an integral part of the same clause – clause (D) of Section 1824(2). With its opinion, the Tenth Circuit effectively rewrites the HPA at the expense of individual rights to give the USDA enforcement powers that were not contemplated by our legislature or by the USDA's own Operating Plan.

CONCLUSION

Based upon the foregoing reasons, McCloy prays that the United States Supreme Court grant his Petition For a Writ of Certiorari.

Respectfully submitted,

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